No. 15-72894 (L), 15-73101

In the United States Court of Appeals for the Ninth Circuit

15-72894 (L)

THE BOEING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

15-73101

NATIONAL LABOR RELATIONS BOARD,

Cross-Petitioner,

v.

THE BOEING COMPANY,

Cross-Respondent.

ON PETITION FOR REVIEW FROM DECISION OF THE NATIONAL LABOR RELATIONS BOARD, NLRB No. 19-CA-089374

BRIEF OF PETITIONER THE BOEING COMPANY

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CORPORATE DISCLOSURE STATEMENT

Petitioner The Boeing Company has no parent corporation. State Street Bank & Trust is the trustee for the various Boeing employees' investment plans and beneficially owns over 10 percent of stock in The Boeing Company. State Street Bank & Trust is a subsidiary of State Street Corporation, which is a publicly traded company.

TABLE OF CONTENTS

Page

JURISDICTIONAL STATEMENT 1
STATEMENT OF THE ISSUES 1
STATUTORY ADDENDUM 2
STATEMENT OF THE CASE 3
I. The Original Complaint Concerned Boeing's Old Policy. 5
II. Boeing Changes Its Policy, but the Board Concludes That Merely Recommending Confidentiality Is an Unfair Labor Practice. 6
A. The Board Majority Construed a Recommendation of Confidentiality as a Prohibition on Communication. 7
B. The Dissenting Board Member Determined That There Was No Violation of the NLRA 11
SUMMARY OF ARGUMENT 12
STANDARD OF REVIEW 15
ARGUMENT 16
I. Boeing's Recommendation of Confidentiality to Participants During HR Investigations Does Not Interfere with Section 7 Rights 16
A. The Board's Interpretation of Boeing's New Policy Defies Common Sense 18
B. The Precedent Cited By the Board Provides No Support. 23
C. The Board Did Not Properly Balance Employees' Section 7 Rights with Boeing's Substantial Justifications for Recommending Confidentiality During HR Investigations. 27
D. The Board Erred in Dismissing Boeing's Right to Express Its Opinion Under Section 8(c) of the NLRA. 35
II. The Board Abused Its Discretion in Requiring a Posting Remedy 38

TABLE OF CONTENTS
(continued)

Page

CONCLUSION 41
CERTIFICATE OF RELATED CASES 42
CERTIFICATE OF COMPLIANCE 43
STATUTORY ADDENDUM 44

TABLE OF AUTHORITIES

Page(s)

CASES

Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB,
253 F.3d 19 (D.C. Cir. 2001) 18, 19, 21

Allentown Mack Sales & Serv., Inc. v. NLRB,
522 U.S. 359 (1998) 15

Aroostook Cty. Reg'l Ophthalmology Ctr. v. NLRB,
81 F.3d 209 (D.C. Cir. 1996) 19

Banner Health Sys. v. NLRB,
No. 15-1245 (D.C. Cir. filed July 30, 2015) 28

Banner Health System,
362 NLRB No. 137 (June 26, 2015) 12, 28

Belle v. Sioux City, LP,
333 N.L.R.B. 98 (2001) 29

Boys Markets, Inc. v. Retail Clerks Union, Local 770,
398 U.S. 235 (1970) 33

Children's Hosp. & Research Ctr. of Oakland, Inc. v. NLRB,
793 F.3d 56 (D.C. Cir. 2015) 37

Consol. Edison Co. v. NLRB,
305 U.S. 197 (1938) 15

Double Eagle Hotel & Casino v. NLRB,
414 F.3d 1249 (10th Cir. 2005) 26

El Torito-La Fiesta Rests., Inc. v. NLRB,
929 F.2d 490 (9th Cir. 1991) 15

Greater Omaha Packing Co. v. NLRB,
790 F.3d 816 (8th Cir. 2015) 36, 37

Greyhound Lines,
319 N.L.R.B. 554 (1995) 30

TABLE OF AUTHORITIES
(continued)

Page(s)

Guardsmark, LLC,
344 N.L.R.B. 809 (2005), *enforced in part, Guardsmark, LLC v. NLRB*, 475 F.3d 369 (D.C. Cir. 2007) 38

Guardsmark, LLC v. NLRB,
475 F.3d 369 (D.C. Cir. 2007) 18

Heck's, Inc.,
293 N.L.R.B. 1111 (1989) 8, 9, 23, 24, 25, 26

Hoffman Plastic Compounds, Inc. v. NLRB,
535 U.S. 137 (2002) 33

Hyundai Am. Shipping Agency, Inc.,
357 N.L.R.B. 860 (2011), *enforced in part and rev'd in part*, 805 F.3d 309 (D.C. Cir. 2015) 10, 28, 34

Hyundai America Shipping Agency, Inc. v. NLRB,
805 F.3d 309 (D.C. Cir. 2015) 17, 28

IBM Corp.,
341 N.L.R.B. 1288 (2004) 29

Idaho, Dep't of Fin. v. Clarke,
994 F.2d 1441 (9th Cir. 1993) 16

Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. NLRB,
834 F.2d 816 (9th Cir. 1987) 36

Lechmere, Inc. v. NLRB,
502 U.S. 527 (1992) 16

Manhattan Eye Ear & Throat Hosp. v. NLRB,
942 F.2d 151 (2d Cir. 1991) 38

Martin Luther Mem'l Home, Inc.,
343 N.L.R.B. 646 (2004) 17, 18, 22, 23

TABLE OF AUTHORITIES
(continued)

Page(s)

N. Ind. Pub. Serv. Co.,
347 N.L.R.B. 210 (2006) 29

NLRB v. Best Prods. Co.,
765 F.2d 903 (9th Cir. 1985) 15

NLRB v. Erie Resistor Corp.,
373 U.S. 221 (1963).....27

NLRB v. Ne. Land Servs., Ltd.,
645 F.3d 475 (1st Cir. 2011).....25, 34

NLRB v. Robbins Tire & Rubber Co.,
437 U.S. 214 (1978).....29

NLRB v. S.E. Nichols, Inc.,
862 F.2d 952 (2d Cir. 1988) 40

NLRB v. Yeshiva Univ.,
444 U.S. 672 (1980).....16

Pauley v. BethEnergy Mines, Inc.,
501 U.S. 680 (1991).....16

Plaza Auto Ctr., Inc. v. NLRB,
664 F.3d 286 (9th Cir. 2011) 15

Radisson Plaza Minneapolis,
307 N.L.R.B. 94 (1992), *enforced*,
987 F.2d 1376 (8th Cir. 1993) 8, 9, 23, 25, 26

Richardson v. Perales,
402 U.S. 389 (1971).....15

Roby v. CWI, Inc.,
579 F.3d 779 (7th Cir. 2009) 32

S. New Eng. Tel. Co. v. NLRB,
793 F.3d 93 (D.C. Cir. 2015).....23

TABLE OF AUTHORITIES
(continued)

Page(s)

Sever v. NLRB,
231 F.3d 1156 (9th Cir. 2000) 16

Sure-Tan, Inc. v. NLRB,
467 U.S. 883 (1984).....38

Torrington Extend-A-Care Emp. Ass'n v. NLRB,
17 F.3d 580 (2d Cir. 1994) 38, 39

United States v. Alghazouli,
517 F.3d 1179 (9th Cir. 2008) 20

STATUTES

29 U.S.C. § 157.....passim

29 U.S.C. § 158.....passim

29 U.S.C. § 621 (Age Discrimination in Employment Act).....31

29 U.S.C. § 651 (Occupational Safety and Health Act) 31

29 U.S.C. § 2601 (Family and Medical Leave Act) 31

38 U.S.C. § 4301 (Uniformed Services Employment and
Reemployment Rights Act) 31

42 U.S.C. § 2000e (Title VII of the Civil Rights Act of 1964) 31

42 U.S.C. § 12101 (Americans with Disabilities Act) 31

42 U.S.C. § 12112(d)(3)(B) 32

REGULATIONS

29 C.F.R. § 825.500(g) 32

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 14, 35, 36

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Equal Emp't Opportunity Comm'n, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), http://www.eeoc.gov/policy/docs/harassment.html.....31, 32

Oxford English Dictionary, http://www.oed.com.....19

JURISDICTIONAL STATEMENT

This consolidated petition for review and cross-application for enforcement concerns a final Decision and Order of the National Labor Relations Board, 362 NLRB No. 195, entered on August 27, 2015. The Board's jurisdiction over the alleged unfair labor practice rested on 29 U.S.C. § 160(a).

Boeing timely petitioned for review in this Court on September 18, 2015. The Board filed a cross-application for enforcement on October 9, 2015, and this Court consolidated the matters on October 29, 2015.

The underlying events took place in the State of Washington; accordingly, this Court has jurisdiction under 29 U.S.C. § 160(f).

STATEMENT OF THE ISSUES

1. Boeing had a confidentiality policy for participants in human resources ("HR") investigations that "directed" participants not to discuss the investigation with others. The policy was challenged as impermissibly prohibiting potential employee communications about conditions of employment. Boeing changed the policy. Now the policy only "recommends" confidentiality. Boeing's new policy serves to protect sensitive personal information, protect participants from retaliation, and protect the investigation from compromise. The policy expressly says that employees may discuss the investigation with their union representative. The new policy was also challenged as impermissibly prohibiting em-

ployee speech, and a divided Board agreed. The first issue is whether the Board's conclusion that the new policy unlawfully interferes with employees' Section 7 rights under the National Labor Relations Act (NLRA) is unreasonable given that the amended policy only *recommends* confidentiality, explains why, informs employees of Boeing's prohibition on retaliation, and expressly says that employees may speak with their union representative.

2. Boeing distributed its new confidentiality policy only to participants in HR investigations. There is no evidence that Boeing disciplined any employee for not accepting the new policy's recommendation, that the new policy has interfered with any employee's exercise of his or her Section 7 rights under NLRA, or that any employee has interpreted the new policy to prohibit protected speech. The Board nevertheless seeks to require Boeing to post a notice nationwide that its HR investigation confidentiality policy violates the NLRA. The second issue is whether the Board's remedy is an abuse of discretion.

STATUTORY ADDENDUM

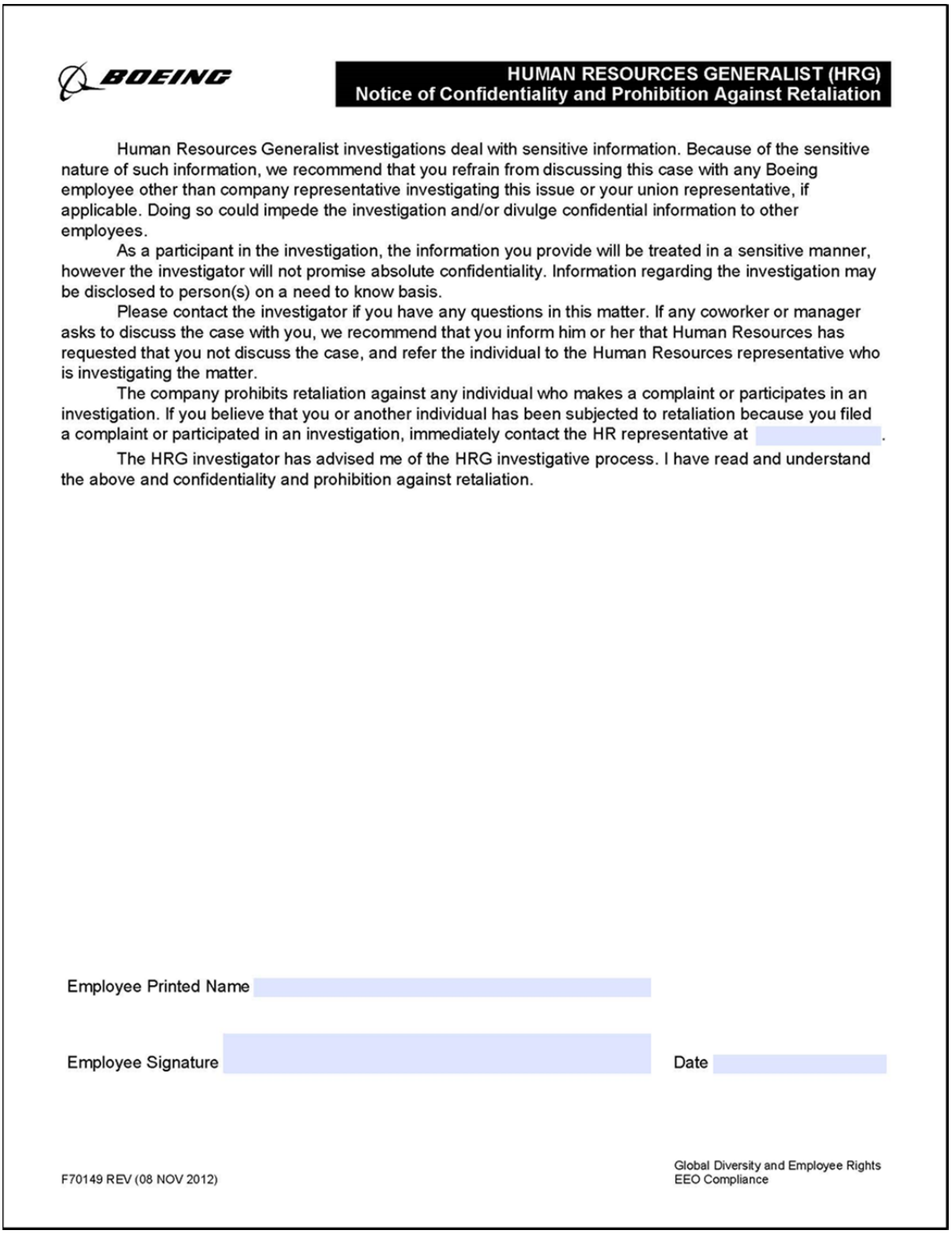
Pertinent provisions are set forth in an addendum to this brief.

STATEMENT OF THE CASE

This case involves an employee-protective confidentiality policy that Boeing seeks to retain for sensible business reasons. In finding unlawful Boeing's mere *recommendation* of confidentiality when employees participate in HR investigations, the Board distorted plain English, improperly construed words in isolation rather than in context, and applied a problematic new standard, since called into question by another Court of Appeals, that discounts an employer's legitimate need to encourage confidentiality during HR investigations.

An older Boeing policy "directed" participants to preserve confidentiality during HR investigations. *See* E.R. 24. When that policy was challenged, Boeing changed it to *recommend* confidentiality. The new policy is stated in a "Notice of Confidentiality and Prohibition Against Retaliation" form. *See* E.R. 25. Boeing's HR department uses this form when investigating employee conduct issues. E.R. 17 at ¶¶ 9-10. Boeing gives the form to management and employee witnesses in those HR investigations. E.R. 18 at ¶¶ 11-12.

The current form, reflecting the new policy, is reproduced below:



BOEING

HUMAN RESOURCES GENERALIST (HRG)
Notice of Confidentiality and Prohibition Against Retaliation

Human Resources Generalist investigations deal with sensitive information. Because of the sensitive nature of such information, we recommend that you refrain from discussing this case with any Boeing employee other than company representative investigating this issue or your union representative, if applicable. Doing so could impede the investigation and/or divulge confidential information to other employees.

As a participant in the investigation, the information you provide will be treated in a sensitive manner, however the investigator will not promise absolute confidentiality. Information regarding the investigation may be disclosed to person(s) on a need to know basis.

Please contact the investigator if you have any questions in this matter. If any coworker or manager asks to discuss the case with you, we recommend that you inform him or her that Human Resources has requested that you not discuss the case, and refer the individual to the Human Resources representative who is investigating the matter.

The company prohibits retaliation against any individual who makes a complaint or participates in an investigation. If you believe that you or another individual has been subjected to retaliation because you filed a complaint or participated in an investigation, immediately contact the HR representative at .

The HRG investigator has advised me of the HRG investigative process. I have read and understand the above and confidentiality and prohibition against retaliation.

Employee Printed Name

Employee Signature

Date

F70149 REV (08 NOV 2012)

Global Diversity and Employee Rights
EEO Compliance

The form is not published, disseminated, or available, and the policy is not applied, to all Boeing employees. Instead, only employees who are actual com-

plainants or witnesses in active HR investigations receive the form. E.R. 18 at ¶¶ 11-12. The stipulated record contains no evidence, nor is there any, that the new policy has interfered with, restrained, or coerced any employee in the exercise of rights guaranteed by Section 7 of the NLRA. Nor does the stipulated record contain any evidence of employee discipline for not complying with the recommendation in the form. As the form says, Boeing recommends confidentiality to protect sensitive employee information and to prevent compromising investigations and potential retaliation against employees.

I. The Original Complaint Concerned Boeing's Old Policy.

The case originated with Joanna Gamble, who worked as a Product Data Management Specialist, a non-represented position, in Renton, Washington. E.R. 18 at ¶ 15. In June 2012, Ms. Gamble participated in an HR investigation and signed the older version of the confidentiality form. E.R. 20 at ¶ 22; *see* E.R. 11. Soon thereafter, an HR employee sent Ms. Gamble an email advising her that the company had received information indicating that the confidentiality policy may have been breached. E.R. 11. Ms. Gamble replied that she "did breach the confidentiality agreement in part." *Id.*

Boeing's HR Department issued a written warning to Ms. Gamble because she discussed the investigation with others contrary to the confidentiality directive.

E.R. 21 at ¶ 31. There is no evidence that any other employee was ever disciplined for violating the old confidentiality policy.

Boeing's Law Department learned of the written warning to Ms. Gamble and had it immediately rescinded. E.R. 22 at ¶¶ 32-33. Boeing formally notified Ms. Gamble in writing that the warning had been rescinded and removed from her record. *Id.* at ¶ 34. Boeing's letter to Ms. Gamble observed:

> Recently, the National Labor Relations Board ruled that an employer cannot prohibit employees from discussing on-going employer investigations other than in specific, individualized circumstances. We were unaware of this ruling at the time of your Corrective Action for "Failure to Comply with the Notice of Confidentiality and Prohibition against Retaliation." Accordingly, we have rescinded this corrective action from your record.

E.R. 11. Ms. Gamble's written warning—relating only to the old version of the form—was in effect for six weeks before it was rescinded. There is no evidence that any employee other than Ms. Gamble herself was aware of the warning during the brief period it was in effect or since.

II. Boeing Changes Its Policy, but the Board Concludes That Merely Recommending Confidentiality Is an Unfair Labor Practice.

In November 2012, Boeing re-wrote the notice form. It eliminated all terms that had required confidentiality, replacing them with the recommendation reproduced above. E.R. 8-9. Notwithstanding the rescission of her warning, Ms. Gamble

filed an amended unfair labor practice charge with the Board, alleging that the new form interfered with her Section 7 rights under the NLRA. E.R. 8.

Even though Ms. Gamble's warning had been rescinded and the old policy changed, the Board's General Counsel issued a Complaint against Boeing. E.R. 9. The Complaint alleged that the old policy *and new policy*, as well as the rescinded discipline of Ms. Gamble, violated Section 8(a)(1) of the NLRA. *Id.*

The parties waived an evidentiary hearing and requested a decision on a stipulated record. *Id.* On July 26, 2013, the Board's Administrative Law Judge concluded that *both* the old and new policies infringed on employees' Section 7 rights in violation of Section 8(a)(1) of the NLRA. *See* E.R. 8-10.

A. The Board Majority Construed a Recommendation of Confidentiality as a Prohibition on Communication.

The Board agreed with the Administrative Law Judge that both the old and the new policy were unlawful in a 2-1 decision. *See* E.R. 1-8. As an initial matter, the Board held that Boeing's old policy that "directed" confidentiality was unlawful because "an employer may prohibit employee discussion of an investigation only when its need for confidentiality with respect to that specific investigation outweighs employees' Section 7 rights." E.R. 2. Boeing disagrees with the Board's conclusion regarding the old policy but has not challenged that conclusion in this appeal because Boeing abandoned the old policy more than three years ago.

Regarding the new policy that only *recommends* confidentiality, the Board found the form "virtually identical" to the old form and treated the word "recommend" as no different than "directing" confidentiality. E.R. 3. In so doing, the Board purported to rely on two prior decisions and a dictionary definition of "recommend."

First, the Board equated the current case to ones in which employers instructed employees not to discuss their compensation. E.R. 3 (discussing *Heck's, Inc.*, 293 N.L.R.B. 1111 (1989), and *Radisson Plaza Minneapolis*, 307 N.L.R.B. 94 (1992), *enforced*, 987 F.2d 1376 (8th Cir. 1993)). Quoting *Radisson Plaza*, the Board said it evaluates "the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act." E.R. 3 (quoting 307 N.L.R.B. at 94). In that case, an employee handbook provision said that one's salary "shouldn't be discussed with anyone other than your supervisor" and was accompanied by "an illustration of a paycheck with the words 'TOP SECRET' emblazoned across it." *Radisson Plaza*, 307 N.L.R.B. at 112. In *Heck's*, an employee booklet said: "The wage paid each Employee is considered confidential information. Therefore your company requests you regard your wage as confidential and do not discuss your salary arrangements with any other Employee." 293 N.L.R.B. at 1114 (footnote omitted). In both cases, the Board found that the policies had a reasonable tendency to coerce employees not to discuss the terms of

their compensation. Here, the Board concluded that the recommendation in Boeing's revised notice form likewise had a reasonable tendency to coerce employees not to discuss HR investigations, which the Board deemed a violation of Section 7 rights. *See* E.R. 3.

Second, as to the fact that neither *Radisson Plaza* nor *Heck's* involved the word "recommend," the Board said that the "generally accepted definition of 'recommend' is 'to advise.'" In the Board's view, "to advise" was sufficiently similar to the language used in *Radisson Plaza* and *Heck's*. *See* E.R. 3. In a footnote, the Board said that the "full context" of the form also supported its interpretation. E.R. 3 n.6. According to the Board, and on the basis of nothing in the stipulated record, when an employer makes a *recommendation* to an employee, the employee "could reasonably construe the communication as carrying the potential for retaliation." E.R. 4 n.6. The Board also thought that seeking a signature on the form showed that, despite what the form says, it is not merely recommending confidentiality. E.R. 4.

Third, the Board disregarded Boeing's justifications for the policy because, in the Board's view, no justification could *ever* suffice to warrant a blanket recommendation of confidentiality. *Id.* Rather, to withstand scrutiny under the majority's approach, any recommendation of confidentiality must be made ad hoc, based on Boeing's determination in the *particular case* "that 'witnesses need protection,

evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up.'" *Id.* (quoting *Hyundai Am. Shipping Agency, Inc.* (*Hyundai I*), 357 N.L.R.B. 860, 874 (2011), *enforced in part and rev'd in part*, 805 F.3d 309 (D.C. Cir. 2015) (*Hyundai II*)). And "[o]nly if [Boeing] determines that such a corruption of its investigation would likely occur without confidentiality is [Boeing] then free to prohibit its employees from discussing these matters among themselves." *Id.* Thus, according to the Board, the need for confidentiality must be shown investigation-by-investigation. *Id.*

Finally, the Board saw no reason why an employer's own Section 8(c) speech rights were relevant. The Board reasoned that those rights apply only to "noncoercive expressions of views about union representation in general or a specific union, as well as related labor controversies," and that employer speech rights do not permit an employer to "adopt rules that would reasonably tend to interfere with the exercise of employees' Section 7 rights." *Id.*

As a remedy, the Board ordered Boeing to post a notice in all of its facilities nationwide stating that Boeing would not maintain, distribute, or enforce confidentiality "directives, requests, and/or recommendations" to employees not to discuss the case with their coworkers during HR investigations, that Boeing would rescind all HR investigation confidentiality notices in effect, and that Boeing had violated the NLRA. E.R. 8; *see* E.R. 13-14. The Board also ordered Boeing to post a notice

at its Renton, Washington facility (where Ms. Gamble worked) with substantially the same language as the nationwide posting, plus the statement that Boeing would not "discipline employees for violating such overbroad confidentiality directives, requests, and/or recommendations." E.R. 7-8.

B. The Dissenting Board Member Determined That There Was No Violation of the NLRA.

The dissenting Board member essentially made four points. First, Boeing's new policy "would not reasonably be understood by employees as interfering with their Section 7 rights to discuss information regarding investigations with others." E.R. 5. Boeing's recommendation was not a mandate, and there was no suggestion that discipline would result if an employee "fail[ed] to follow the recommended course of action." *Id.* The dissent said that the majority "distorts the ordinary meaning" of the words in the form, "which are clearly not synonymous with words such as 'direct,' 'order,' or 'mandate.'" *Id.*

Second, the majority relied on Board authority that was not relevant to this case. E.R. 6. The majority's precedents involved instructions to keep salary and wages confidential. Both the mandatory language and context of those cases was materially different from Boeing's new policy. *Id.*

Third, the standard from *Hyundai I* was "impractical, improper, and fail[ed] to fairly balance employees' Sec. 7 interests and employers' interests in being able to conduct essential investigations in the workplace confidentially." E.R. 5 n.2.

The *Hyundai I* standard forced Boeing to determine at the outset of an investigation, when Boeing would "likely have *little to no knowledge of the underlying facts upon which the standard turns*, . . . whether witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a coverup." *Id.* (emphasis in original). The dissent noted agreement with the dissenting Board member in *Banner Health System*, 362 NLRB No. 137 (June 26, 2015), who also criticized the Board majority's application of the *Hyundai I* standard in that case. Moreover, Boeing in this case was just expressing its *preference* that employees maintain confidentiality during HR investigations, so the dissent did not believe that there was an employer "rule" that required the employer's justification. E.R. 7 n.6.

Finally, the policy, as merely a recommendation, was properly considered Boeing's protected "expression of opinion" under Section 8(c) of the NLRA. E.R. 6. The dissent did not consider Boeing's recommendation to be "really a threat in disguise." E.R. 7. The majority erred by "essentially reading Section 8(c) out of the statute when it comes to Section 8(a)(1)." *Id.*

SUMMARY OF ARGUMENT

The Board's interpretation of the *recommendation* in Boeing's new policy is arbitrary and capricious. There is no reasonable basis to conclude that employees would interpret the policy as prohibiting speech protected by Section 7. Boeing's

recommendation of confidentiality protects employees and serves legitimate business needs. It sensibly balances Section 7 rights and other legitimate interests, including compliance with other employment laws. The Board's reasoning should be rejected for four independent reasons, namely, it: convolutes the plain language of Boeing's new policy, misapplies the Board's own precedent, disregards Boeing's valid business justifications, and nullifies Boeing's right to express its opinion about the value of confidentiality during HR investigations.

First, the Board distorts the ordinary meaning of the words on the form, both in isolation and in context. No reasonable employee would construe a recommendation as a prohibition. But to eliminate any doubt, the new policy clearly says that employees may speak to their union representative. The form explains that the purpose of confidentiality is to protect investigations and prevent retaliation, and also does not threaten discipline. Unsurprisingly, there is no evidence that any Boeing employee ever construed the form as coercive, and no Boeing employee has ever faced discipline for disregarding the recommendation in the new policy.

Second, the Board's application of its own precedent is thoroughly unpersuasive. The employer rules in the other Board cases concerned employees' ability to discuss their wages, which strikes at the core of employees' Section 7 rights, and the language and context of those employer rules made clear that they were mandatory. Boeing's new policy cannot be shoehorned into the reasoning in those cases.

Third, if the matter were even close—and it is plainly not—the Board did not properly balance Boeing's substantial business justifications in favor of the policy. The Board's requirement of an investigation-by-investigation determination as to whether to even *recommend* confidentiality slights these compelling concerns and serves no useful purpose given the minimal, if any, impact on Section 7 rights. Indeed, the Board's position is inconsistent with federal employment laws and its own practices for conducting investigations, which in many instances mandate blanket confidentiality.

Fourth, the Board's position violates an employer's speech rights under Section 8(c) of the NLRA and the First Amendment. Boeing has the right to tell its employees that it believes confidentiality is the best policy with respect to HR investigations for purposes of protecting the investigations and employees.

Because there is no violation of the NLRA, the remedy should be set aside. But even if the violation were affirmed, the Board abused its discretion in ordering a nationwide posting remedy. The form in question has been provided only to potential witnesses in active HR investigations, not every single employee. Further, there is no record showing discipline or interference with protected rights as to the new policy. (Even as to the old policy, the only affected party—Ms. Gamble—has already received actual notice of the Board's decision.) In the absence of evidence,

the remedy is wholly disproportionate to the dubious violation the Board has found or any speculative theory of harm.

STANDARD OF REVIEW

This Court reviews a Board order to assess whether the Board "correctly applied the law" and whether "the Board's findings of fact are supported by substantial evidence on the record as a whole." *NLRB v. Best Prods. Co.*, 765 F.2d 903, 906 (9th Cir. 1985). Under the substantial evidence test, this Court considers if "it would have been possible for a reasonable jury to reach the Board's conclusion." *Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286, 291 (9th Cir. 2011) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998)). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Although the parties agreed to a stipulated record in this case, the Board "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown*, 522 U.S. at 378.

This Court "will not enforce an NLRB order that clearly departs from the Board's own standards or that is based on standards that are themselves invalid." *El Torito-La Fiesta Rests., Inc. v. NLRB*, 929 F.2d 490, 493 (9th Cir. 1991).

"[T]here is no requirement that the courts must defer to an administrative interpretation when there are compelling indications that the administrative interpretation is wrong." *Idaho, Dep't of Fin. v. Clarke*, 994 F.2d 1441, 1445 (9th Cir. 1993) (citation omitted); *see Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) (rejecting Board conclusion based on "erroneous legal foundations" (citation omitted)); *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980) (observing that "great respect to the expertise of the Board" is appropriate "when its conclusions are rationally based on articulated facts and consistent with the [NLRA]."). When the Board's decision is inconsistent with its prior precedent, less deference is due unless the Board establishes that the new position is reasonable. *See, e.g.*, *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (noting that "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views").

This Court reviews the Board's choice of remedy for an abuse of discretion. *Sever v. NLRB*, 231 F.3d 1156, 1165 (9th Cir. 2000).

ARGUMENT

I. Boeing's Recommendation of Confidentiality to Participants During HR Investigations Does Not Interfere with Section 7 Rights.

Section 7 of the NLRA protects the rights of employees to form labor organizations, bargain collectively, and engage in other concerted activities. *See* 29 U.S.C. § 157. It is unlawful for an employer to interfere with, restrain, or coerce

employees in the exercise of those rights. To determine whether an employer's rule interferes with Section 7 rights, the first question the Board asks is whether the rule restricts Section 7 activity explicitly. *Hyundai II*, 805 F.3d at 313. Boeing's policy does not. *See id.* at 314 (noting that Hyundai's rule banning discussion in all investigations did not facially restrict Section 7 activity).

If there is no explicit restriction of Section 7 activity, then the Board asks "whether the rule (1) could be reasonably construed by employees to restrict § 7 activity, (2) was adopted in response to such activity, or (3) has been used to restrict such activity." *Id.* at 313-14. If any of those criteria are met, then "the employer can retain the rule only by showing an adequate justification." *Id.* at 314. Here, there is no evidence in the stipulated record—and the Board has never contended—that the new policy was adopted in response to Section 7 activity or has been used to restrict Section 7 activity.

Thus, the initial question here is only whether Boeing's new policy—as reflected on the form *in its entirety*—could be reasonably construed by employees to restrict Section 7 activity. In answering that question, the Board "will not conclude that a reasonable employee would read the rule to apply to [Section 7] activity simply because the rule *could* be interpreted that way." *Martin Luther Mem'l Home, Inc.*, 343 N.L.R.B. 646, 647 (2004) (emphasis in original). Such a standard

"would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable." *Id.*

Instead, the Board should "focus[] on the text of the challenged rule." *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007). The Board "must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Martin Luther*, 343 N.L.R.B. at 646. The Board cannot declare "a policy to be facially unlawful based upon 'fanciful' speculation, but rather ha[s] to consider the context in which the rule was applied and its actual impact on employees." *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001).

Applying those standards, the Board's conclusion that employees would interpret a *recommendation* of confidentiality during HR investigations as prohibiting the exercise of Section 7 rights, or that they would otherwise be chilled in exercising those rights, is not supported by the evidence and is arbitrary and capricious.

A. The Board's Interpretation of Boeing's New Policy Defies Common Sense.

In order to find that Boeing's new policy violates the NLRA, the Board distorted the plain meaning of the words in the form—transforming a recommendation into a command—and ignored any aspect of the form that contradicted the Board's predetermined conclusion. The Board's interpretive theory has no limiting

principle. No matter what an employer's policy actually says, the Board could construe it to restrict Section 7 activity. Such an approach is unreasonable and warrants this Court's correction.

A recommendation is permissive in nature, a suggestion, and not a requirement. The Oxford English Dictionary defines "recommend" as:

> 4a. To mention or present (a thing, course of action) *to* (also *unto*) a person, etc., as being desirable or advisable.
>
> 7a. To offer counsel or advice *to* someone (*to* do something).[1]

There is no doubt that the revised form expresses a preference for confidentiality. But Boeing employees would have to hold some unorthodox understanding of what a recommendation is in order to conclude, as the Board says, that they are not "free to disregard the . . . 'recommendation.'" E.R. 4. That it is possible to conjure some scenario where a recommendation might be considered a command is irrelevant. *See Adtranz*, 253 F.3d at 28 (observing that "the NLRB has itself cautioned against parsing workplace rules too closely in a search for ambiguity that could limit protected activity"); *Aroostook Cty. Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996) ("Once again, the Board has imagined horrible hypothetical situations (which, if true, might violate the Act) that have nothing much

[1] *Oxford English Dictionary*, http://www.oed.com/view/Entry/159715?rskey=UYHmFA&result=2&isAdvanced=false#eid (last visited May 16, 2016).

to do with the rule as written and enforced by the Company."). Here, there is no basis for thinking that a reasonable employee would have anything other than the normal understanding of the word "recommend."

Moreover, the form read *as a whole* reinforces the permissive nature of Boeing's confidentiality policy. While the first paragraph only *recommends* that employees refrain from discussing the case, the fourth paragraph expressly *prohibits* retaliation. E.R. 25. Given the unambiguous, express directive as to retaliation, no employee would reasonably construe the advisory term "recommends" in the same form as being mandatory. Put differently, if only a recommendation appeared, it might conceivably be open to question whether it should be construed as a prohibition. But since on a different matter an express prohibition was chosen, then it is no longer sensible to think the mere recommendation is a prohibition. HR forms are not statutes, but the common sense of statutory interpretation also applies. *Cf. United States v. Alghazouli*, 517 F.3d 1179, 1187 (9th Cir. 2008) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" (quoting 2A Norman A. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction § 46.6 (6th ed. 2006))).

As further example, the second paragraph of the form says that information about the investigation may be disclosed on a "need to know basis." The overarch-

ing message is that both witness and investigator should treat sensitive information learned in the investigation with care and should exercise discretion, but that neither is prohibited from disclosing information.

There is even less reason to believe that Boeing employees would think that they cannot exercise their Section 7 rights. The form explains that confidentiality protects the integrity of investigations and also protects employees from retaliation. If an employee were to conclude that there was something troubling about how the investigation was conducted or the subject matter of the investigation—something actually related to Section 7—there is nothing in the form saying that confidentiality should apply to those concerns. To the contrary, the form expressly provides that employees may talk to their union representative without restriction.

The Board attempts to portray the form as conveying a demand or a message that would chill an employee's Section 7 rights, citing "the notice's clear communication of [Boeing's] desire for confidentiality, [Boeing's] routine requests that employees sign the notice, and the lack of any assurance in the notice that employees were free to disregard [Boeing's] recommendation that they refrain from discussing the matter under investigation." E.R. 3. With respect to the first point, the Board ignores the form's straightforward explanation of the legitimate reasons *why* Boeing recommends confidentiality. *Cf. Adtranz*, 253 F.3d at 27 ("We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity

which prompt many employers to adopt the sort of rule at issue here."). To construe the form as implicitly demanding confidentiality for oppressive reasons that might include chilling Section 7 rights unreasonably ignores the policy's language and context and simply "presume[s] improper inference." *See Martin Luther*, 343 N.L.R.B. at 646.

As for having employees sign the form, the Board ignores the form's other primary purpose. The form expressly prohibits retaliation. It tells employees whom to contact—and how—if they suffer or learn of retaliation. And it tells employees that the investigator cannot promise confidentiality and whom to contact if they have any questions. The employee's signature on the form shows that the employee received and understood all of the information.

The Board's final point regarding the need for an "assurance" is unsound. As the dissenting Board member recognized, "the suggestion that the notice lacks some additional assurance that the 'recommendation' may be disregarded is just bootstrapping—requiring acceptance of the unsupported implicit premise that the revised notice is coercive without such assurances." E.R. 7. The form does not mention any potential for discipline tied to the recommendation of confidentiality.

It may be conceivable that a given employee could misconstrue the form to prohibit Section 7 activity, but such a reading is not reasonable. Here, as in *Martin Luther*,

> reasonable employees would not read the rule [to prohibit Section 7 activity]. They would realize the lawful purpose of the challenged rules. That is, reasonable employees would infer that the Respondent's purpose in promulgating the challenged rules was to ensure a 'civil and decent' workplace, not to restrict Section 7 activity.

343 N.L.R.B. at 648. Reasonable employees would recognize that Boeing's revised policy promotes a civil and decent workplace by assuring employees that it will treat sensitive information they provide in HR investigations with care, by encouraging witnesses to likewise treat sensitive information they learn during active HR investigations with care, and by assuring employees that Boeing does not tolerate retaliation against those who participate in those investigations. The Board ignores its own precedent in proclaiming otherwise.

The Board's reading of the revised notice is unreasonable and defies common sense. As the dissenting Board member concluded, "'[c]ommon sense sometimes matters in resolving legal disputes,' and should prevail here." E.R. 7 (quoting *S. New Eng. Tel. Co. v. NLRB*, 793 F.3d 93, 94 (D.C. Cir. 2015)).

B. The Precedent Cited By the Board Provides No Support.

In reaching the counter-intuitive conclusion that a recommendation is actually a mandate, the Board relied upon two readily distinguished cases: *Heck's, Inc.*, 293 N.L.R.B. 1111 (1989), and *Radisson Plaza Minneapolis*, 307 N.L.R.B. 94 (1992), *enforced*, 987 F.2d 1376 (8th Cir. 1993). As the dissent in this case correctly explains, the language of the rules in *Heck's* and *Radisson Plaza* was substan-

tially different, the overall context was different, and the rules in those cases—expressly barring discussion of terms of compensation—struck at the heart of Section 7.

The employer rule in *Heck's* has little resemblance to Boeing's new policy. In analogizing to *Heck's*, the Board ignores the fact that the employer rule there flat out said, "*do not discuss* your salary arrangements with any other Employee." 293 N.L.R.B. at 1114 (emphasis added). The *Heck's* rule was mandatory. The Board chooses instead to emphasize that the employer rule in *Heck's* also said that the "company requests you regard your wage as confidential." *Id.* Then the Board makes much of the fact that Boeing's form also at one point uses the word "requested." *See* E.R. 4. In the third paragraph of the form, Boeing provides guidance if a witness is asked questions outside the investigation, suggesting that the witness can reply that HR "requested" that the witness not discuss the investigation, and tell the coworker or manager to inquire further with HR. E.R. 25. This optional script helps witnesses finesse awkward questions and deflect busybodies and potentially hostile co-workers. It does not transform a recommendation into a mandate. More importantly, the *Heck's* "request" was accompanied by an unqualified directive not to discuss salaries. Nothing in Boeing's policy is equivalent to saying "do not discuss [the investigation] with any other Employee," which would be the direct translation of *Heck's* to this case.

Similarly, the Board misrepresents the employer rule in *Radisson Plaza* to find it applicable to this case. In discussing *Radisson Plaza*, the Board discounts the "TOP SECRET" graphic that accompanied an employee handbook instruction saying that "Your salary is determined individually, is confidential, and shouldn't be discussed with anyone other than your supervisor or the Personnel Department." 307 N.L.R.B. at 94. Not only is the language mandatory in the *Radisson Plaza* rule, but the "TOP SECRET" graphic was central to the Board's decision in that case. *See id.* at 94 n.2 (observing that any arguable distinction between "a rule that *requires* employees to keep their wages confidential and one that *advises* them that they *should not* discuss wages . . . is obliterated by the Respondent's use of a graphic that boldly indicates that the contents of an employee's pay envelope are 'top secret.'"). The graphic mattered, and the Board is not faithfully applying its precedent in suggesting otherwise here.

Finally, the subject matter of those cases is completely different. The instructions in *Heck's* and *Radisson Plaza* targeted employee compensation, one of the most fundamental subjects of protected activity, which is expressly addressed in the NLRA. *See* 29 U.S.C. § 158(d) (recognizing duty to bargain with respect to "wages, hours, and other terms and conditions of employment"); *see also Ne. Land Servs*, 645 F.3d at 482 ("The precise subject matter of the forbidden disclosure—terms of employment, including compensation—went to a prime area of concern

under section 7."); *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1260 (10th Cir. 2005) ("Double Eagle's definition of 'confidential information' clearly violates § 8(a)(1) because it expressly includes 'salary information[,] . . . salary grade [, and] . . . types of pay increases.'"). Almost any conversation between employees about their wages could at least arguably be protected. The same cannot be said about conversations concerning ongoing HR investigations of sensitive personnel matters. Idle gossip about a co-worker's misfortunes, rumor mongering of unsubstantiated allegations of employee misconduct, collusion among potential witnesses, and witness intimidation—the kinds of communications targeted by the notice—are not protected. And communications that clearly *are* protected (consulting with union representatives) are expressly permitted.

So even if the recommendation in Boeing's policy could reasonably be read as a directive—and it cannot—Boeing's policy is different from the rules in *Heck's* and *Radisson Plaza* because there is an express carve-out for employee discussions with union representatives. The Board's inapt analogies to *Heck's* and *Radisson Plaza* neglect that important difference. Indeed, the Board cannot even specify the protected conduct the form would purportedly chill. *See* E.R. 3-4. The Board never explains what aspect of an HR investigation employees would reasonably think they are prohibited from discussing, or how that aspect is connected with Section 7 rights.

C. The Board Did Not Properly Balance Employees' Section 7 Rights with Boeing's Substantial Justifications for Recommending Confidentiality During HR Investigations.

An employer rule that infringes on Section 7 rights does not violate the NLRA if there is a legitimate and substantial business justification for it. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963). Because Boeing's new policy does not reasonably coerce or limit any employee's Section 7 rights, this Court can reverse the Board's decision on that basis alone. But in addition to misconstruing how a reasonable employee would interpret the new policy, the Board ignored Boeing's legitimate business interests for recommending confidentiality.

The current Board insists that there be a robust, individualized showing that an investigation is likely to be compromised before confidentiality may be required. That new approach is misguided and has yet to be approved by any Court of Appeals. But whatever its merit when applied to a rule that actually *prohibits* discussing investigations, applying it in a case where confidentiality is only *recommended* (and employees are told that they can talk to their union representative) makes no sense. Boeing's policy is a sensible accommodation of Section 7 rights and legitimate business interests, including compliance with other workplace laws and guidelines.

The Board's new hostility toward confidentiality policies began in 2011. In *Hyundai I*, the Board adopted a new rule that employers must make an individual-

ized confidentiality determination in each investigation, and it found the use of generalized confidentiality rules in personnel investigations per se unlawful. 357 N.L.R.B at 874. The Board also applied the *Hyundai I* standard in *Banner Health System*, 362 NLRB No. 137 (June 26, 2015). In that case, the Board said "it is the employer's burden to justify a prohibition on employees discussing a particular ongoing investigation" and "[t]he employer must proceed on a case-by-case basis." *Id.* at *5. A petition for review in *Banner Health* is currently pending in the D.C. Circuit and an argument date has not been set. *See Banner Health Sys. v. NLRB*, No. 15-1245 (D.C. Cir. filed July 30, 2015).

In November 2015, the D.C. Circuit issued its opinion in *Hyundai II*. The Court agreed that Hyundai's rule *banning* discussion of *all* investigations was overbroad. 805 F.3d at 314. But the Court refused to endorse a requirement of individualized, risk-of-corruption showings to support mandating confidentiality:

> [W]e need not and do not endorse the ALJ's novel view that in order to demonstrate a legitimate and substantial justification for confidentiality, an employer must 'determine whether in any give [sic] investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up.'

Id. (quoting ALJ's Order).

There are, in fact, many compelling interests in a confidentiality policy, and the Board has recognized them: protecting witnesses, victims, or accused employ-

ees; preventing unfounded rumors from spreading; ensuring the employer will get the full truth through investigation; and encouraging employees with complaints and information to come forward with such information. *See, e.g.*, *IBM Corp.*, 341 N.L.R.B. 1288, 1293 (2004); *Belle of Sioux City, LP*, 333 N.L.R.B. 98, 113-14 (2001). The Board recognizes that confidentiality "encourag[es] witnesses to participate in investigations of workplace misconduct" and protects them from witness retaliation. *N. Ind. Pub. Serv. Co.*, 347 N.L.R.B. 210, 212 (2006). Boeing's new policy advances each of those legitimate interests. The Board did not consider those interests at all because of its reflexive application of *Hyundai I*'s problematic case-by-case approach.

The Board's refusal to accept that legitimate interests can justify blanket confidentiality rules contradicts the Board's own practice and guidance from federal courts and agencies. It also ignores the practical, real-world conditions employers face when investigating employee complaints and misconduct.

The Board itself enforces a blanket confidentiality rule for witness affidavits. *Cf. NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 216-17 (1978) (arguing that witness statements are exempt from Freedom of Information Act requests). Indeed, the Board has told the Supreme Court that "a particularized, case-by-case showing" to justify its confidential affidavit rule "is neither required nor practical." *Id.* at 222. And at its hearings, the Board has a witness sequestration rule, the obvi-

ous purpose of which is to prevent tailoring of testimony by witnesses. *See Greyhound Lines*, 319 N.L.R.B. 554, 554 (1995).[2]

The Board's own blanket confidentiality rules serve to protect complainants and witnesses from retaliation and to advance the integrity of witness testimony. Encouraging participants to maintain confidentiality during HR investigations serves these interests, too, but also serves others that are less likely to arise in the Board investigation context. HR investigations necessarily involve sensitive personal information about employees, including information about their private lives and relationships, health and medical conditions (including mental health), substance abuse problems, relationships with co-workers, performance concerns, fears of inadequacy at work, and allegations of misconduct that may or may not ultimately be substantiated. Complainants and witnesses alike may hesitate to come forward or speak candidly with investigators about such issues, and the targets of complaints also have privacy interests that employers are obliged to protect. Investigation confidentiality policies encourage employees to come forward with com-

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[2] The Board explained its witness sequestration rule as follows:

> The rule . . . means that from this point on until the hearing is finally closed, no witness may discuss with other potential witnesses either the testimony that they have given or that they intend to give. The best way to avoid any problems is simply not to discuss the case with any other potential witness until after the hearing is completed.

Greyhound Lines, 319 N.L.R.B. at 554.

plaints and to provide witness information while also protecting the legitimate privacy interests of persons who are the subjects of complaints.

For many of the same reasons, confidential investigations are integral to compliance programs for many state and federal employment laws. *See, e.g.*, 42 U.S.C. § 2000e (Title VII of the Civil Rights Act of 1964); 42 U.S.C. § 12101 (Americans with Disabilities Act); 29 U.S.C. § 2601 (Family and Medical Leave Act); 29 U.S.C. § 621 (Age Discrimination in Employment Act); 29 U.S.C. § 651 (Occupational Safety and Health Act); 38 U.S.C. § 4301 (Uniformed Services Employment and Reemployment Rights Act).

The EEOC deems confidentiality to be essential to conducting investigations as part of enforcing Title VII and implicitly endorses blanket confidentiality rules. EEOC enforcement guidance provides:

> An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, *information about the allegation of harassment should be shared only with those who need to know about it.*[3]

[3] Equal Emp't Opportunity Comm'n, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999) (emphasis added), http://www.eeoc.gov/policy/docs/harassment.html (last visited May 16, 2016).

The EEOC Guidance also instructs employers to include "[a]ssurance that the employer will protect the confidentiality of harassment complaints to the extent possible" in their anti-harassment and complaint procedure policies. *Id.* In order to protect the confidentiality of harassment complaints "to the extent possible," employers must caution witnesses to whom those allegations must be disclosed for purposes of the investigation to themselves treat those allegations as confidential. For example, in *Roby v. CWI, Inc.*, 579 F.3d 779 (7th Cir. 2009), the court held that the employer had exercised reasonable care in handling a harassment complaint because it "performed an investigation, instructed interviewees that the information was confidential, [and] fired [a supervisor] when he breached confidentiality." *Id.* at 786.[4]

The fact of the matter is that any employer that wishes to encourage compliance with state and federal employment laws—and other requirements, such as Sarbanes-Oxley—must put in place systems that protect employees when they bring complaints and also protect those who participate in investigations. Yet the Board interprets the NLRA in a manner that makes prophylactic recommendations aimed at fostering or ensuring compliance unlawful. In doing so, the Board ne-

[4] Employers must also maintain the confidentiality of medical information that is obtained and retained by the employer for purposes of reasonable accommodation and other requests. *See* 42 U.S.C. § 12112(d)(3)(B). Similarly, the FMLA mandates that employers preserve the confidentiality of medical information. *See* 29 C.F.R. § 825.500(g).

glects its duty to interpret the NLRA in a manner that accounts for the important Congressional objectives underlying other employment laws. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 251 (1970) (requiring courts to "accommodate [and] reconcile the older statutes with the more recent ones"); *cf. Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (observing that "where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield"). The Board accepts that confidentiality protects investigations and protects against retaliation, yet the Board offers no explanation of how diminishing confidentiality will not lead to more compromised investigations, more retaliation, and more employees opting not to disclose concerns or cooperate in investigations, which means less effective enforcement of other laws.

Moreover, the Board's requirement of upfront, individualized articulation of Boeing's possible confidentiality interests is impossible as a practical matter. Early on in an investigation, HR investigators will not necessarily have enough information about the subject to make an informed determination of how important confidentiality will be. In such cases, prophylactic notice is essential. Without it, by the time the need for confidentiality is clear, the investigation may already be compromised. In a company as large as Boeing (160,000 employees), which must rely on HR personnel in the field to conduct HR investigations, a uniform notice

also ensures that the legitimate interests and concerns of employer and employee are addressed consistently and fairly. In contrast, requiring each HR representative to make his or her own ad hoc determinations and to prepare individualized confidentiality notices for every investigation would invite arbitrary variation, with some investigators erring in favor of rigid gag orders and others failing to provide notice needed to protect the integrity of investigations and employee privacy.

In any event, this case does not present the scenario where an employer wishes to *require* confidentiality backed up by a threat of discipline. *Cf. Hyundai I*, 357 N.L.R.B. at 860 (employer rule "prohibiting employees from discussing with other persons any matters under investigation by its human resources department"); *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 482 (1st Cir. 2011) (employer's confidentiality rule said "[d]isclosure of these terms [of employment] to other parties may constitute grounds for dismissal"). There is no evidence of any Boeing employee being disciplined for "violating" the new policy (however one would "violate" a recommendation). Boeing's new policy does not fit into either of those molds. Boeing is merely recommending confidentiality, explaining why, and expressly providing that employees can talk with a union representative. The Board has not established that Boeing's policy will have any impact on Section 7 rights, much less an impact that could possibly outweigh the compelling interests furthered by confidentiality.

The Board may prefer that employers make some "preliminary assessment" of the need for confidentiality in every case, but an employer is entitled to maintain reasonable policies of its own choosing so long as its legitimate interests supporting those policies outweigh their impact on protected rights. Here, Boeing's legitimate interests in maintaining its recommendation of confidentiality easily outweigh any arguable impact on protected rights. Communication is not prohibited; confidentiality is merely recommended; the reasons for that recommendation are clearly stated and compelling; and ad hoc, individualized notice is not a realistic alternative. In contrast, the recommendation's alleged impact on employee rights is speculative at best. Under these circumstances, the Board's insistence that Boeing must always make an individualized assessment before recommending confidentiality is unreasonable.

D. The Board Erred in Dismissing Boeing's Right to Express Its Opinion Under Section 8(c) of the NLRA.

No one could seriously question that Boeing has the right to opine on whether confidentiality in investigations is a good idea or not. And Boeing's right to do that is protected by Section 8(c) of the NLRA and the First Amendment. Section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provi-

> sions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c). There is no threat of reprisal in this case, yet the Board concluded that Section 8(c) is "unavailing." E.R. 4. The Board offers no coherent basis for why Section 8(c) is not dispositive given that Boeing is merely recommending confidentiality.

"Section 8(c) affirms an employer's First Amendment right to express 'any views, arguments, or opinion' without violating section 8(a)(1) as long as that expression contains 'no threat of reprisal or force or promise of benefit.'" *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. NLRB,* 834 F.2d 816, 820 (9th Cir. 1987). Although Section 8(c) often is applied to an employer's noncoercive expression of views about employees' union organizational activity, Section 8(c) is not limited to those statements alone. By its plain text, Section 8(c) applies to shield the expression of views from being evidence of "an unfair labor practice under any of the provisions of this subchapter," provided there is "no threat of reprisal or force or promise of benefit."

The Eighth Circuit recently emphasized that a threat of reprisal or force or a promise of a benefit is required to remove the protection of Section 8(c). *Greater Omaha Packing Co. v. NLRB*, 790 F.3d 816, 823 (8th Cir. 2015) ("[U]nless the statement itself coerces an employee not to exercise his rights, it is protected by Section 8(c) and is not a violation of Section 8(a)(1).").

The Board majority faulted Boeing's notice form because it expressed Boeing's "desire" for confidentiality. E.R. 3. Boeing acknowledges that the notice conveys Boeing's preference that employees treat investigations as confidential (and, of course, the form explains the legitimate reasons for Boeing's preference). Boeing has a right to express that view. Nothing in the terms of the notice "coerces an employee not to exercise his rights." *See Greater Omaha Packing*, 790 F.3d at 823. Instead, the Board's conclusion that employees could reasonably construe the notice to prohibit unspecified protected expression is naked speculation. The employer's clearly protected speech has been impermissibly banned in favor of a remote, hypothetical potential impact on ill-defined employee rights.

As the dissent noted, the Board is required to consider any sections of the NLRA that might conflict in a particular case. *Cf. Children's Hosp. & Research Ctr. of Oakland, Inc. v. NLRB*, 793 F.3d 56, 59 (D.C. Cir. 2015). Here, the Board did not consider the potential conflict between Boeing's right to free speech under Section 8(c) and employees' right to engage in protected activities under Section 7. Any reasonable assessment of those rights would find that a mere recommendation of confidentiality is a permissible expression of opinion by Boeing that does not include a threat of reprisal or force against employees, especially when the recommendation targets unprotected speech and expressly excepts protected speech with union representatives.

II. The Board Abused Its Discretion in Requiring a Posting Remedy.

If the Court agrees that Boeing's new policy does not violate the NLRA, it must of course decline to enforce the Board's remedy. The Court should in any event reject that remedy because the postings ordered by the Board serve no remedial purpose.

Board orders must be remedial: they "must compensate for the injury actually suffered by the employees." *Manhattan Eye Ear & Throat Hosp. v. NLRB*, 942 F.2d 151, 157 (2d Cir. 1991). Board-ordered "[r]elief 'must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices.'" *Torrington Extend-A-Care Emp. Ass'n v. NLRB*, 17 F.3d 580, 585 (2d Cir. 1994) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984)). A multi-facility posting remedy is generally only warranted when an employer engages in egregious "hallmark violations," such as discharges, facility closures, or complete denials of compensation and benefits, *id.* at 586, or when an unlawful rule is generally applicable and published or distributed to all employees, *see Guardsmark, LLC*, 344 N.L.R.B. 809, 812 (2005), *enforced in part, Guardsmark, LLC v. NLRB*, 475 F.3d 369, 381 (D.C. Cir. 2007).

Although Boeing's old and new forms have been used at multiple facilities, no "hallmark violations" are present in this case. The alleged violation was not egregious or widespread. No employee has ever been disciplined in connection

with the current form. Even with regard to the old form, Ms. Gamble merely received a warning (which Boeing promptly rescinded in 2012) and no further discipline—a far cry from discharge or other "hallmark violations." Moreover, Ms. Gamble's is the sole example of discipline for any employee under the old form, and there is no reason to believe that any employee other than Ms. Gamble herself knew of it.

A multi-facility posting remedy is not appropriate when, as here, the policy alleged to violate the NLRA was not widely distributed or publicized. Only Boeing employees who have been part of HR investigations over the last three years have received the new form. The form has never been posted publicly at any Boeing facilities, nor has it been disseminated to Boeing employees generally. The vast majority of employees have no knowledge of the form, and their Section 7 rights could not have been impacted by its distribution to a select number of employees. As a practical matter, the nature of the alleged violation itself does not require any broad posting remedy: every future witness involved in an HR investigation will receive whatever new form is required.

There has been no harm, and the Board's order is not properly remedial. *See Torrington Extend-A-Care*, 17 F.3d at 585 ("A corporate-wide order is properly remedial where either the evidence supports an inference that the employer will commit further unlawful acts at a substantial number of other sites or the record

shows that employees at other sites are aware of the unfair labor practices and may be deterred by them from engaging in protected activities." (citing *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 960-61 (2d Cir. 1988))). This case has no resemblance, for example, to a case like *S.E. Nichols*, in which the Second Circuit upheld a remedial facility-wide posting notice when the company engaged in numerous unfair labor practices at one of its stores, had a fifteen-year history of violations of the NLRA, and the company's president and a division-level manager were personally involved in spreading threats of unfair labor practices. *See* 862 F.2d at 961. This Court should set aside the Board's nationwide posting remedy as an abuse of discretion because it is overbroad, unnecessary, and not properly remedial.

Finally, the Board further abused its discretion by requiring (1) nationwide posting concerning the *old* policy and (2) posting in Renton, Washington with respect to Ms. Gamble's written warning, neither of which would serve any remedial purpose. Whether or not the old form could have reasonably been construed to violate the NLRA, any such technical violation was not a "hallmark" violation for reasons addressed above; the vast majority of Boeing employees had no knowledge of the form (because it was never posted or disseminated generally), so their Section 7 rights could not have been impacted by its distribution to a select number of employees; and the form was discontinued more than three years ago and has not been used since. This discontinued form has no conceivable bearing on current or future

protected activity. Under these circumstances, a company-wide posting serves no remedial purpose. Similarly, requiring a separate posting at the Renton, Washington facility with respect to Ms. Gamble's written warning serves no remedial purpose because that warning was promptly rescinded and repudiated by Boeing itself, there is no evidence that anyone other than Ms. Gamble was even aware of it, and (as charging party) Ms. Gamble has already received actual notice of the Board's decision in this case. Any further remedy—and posting in particular—would be gratuitous.

CONCLUSION

Boeing's petition for review should be granted and enforcement of the Board's order should be denied.

Respectfully submitted.

s/ Charles N. Eberhardt

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CERTIFICATE OF RELATED CASES

Counsel is unaware of any related cases within the meaning of Ninth Circuit Rule 28-2.6.

s/ Charles N. Eberhardt
Charles N. Eberhardt

Dated: May 16, 2016

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 9,097 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

s/ Charles N. Eberhardt
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Dated: May 16, 2016

STATUTORY ADDENDUM

Page

29 U.S.C. § 157 ..... A-1
29 U.S.C. § 158(a) A-2
29 U.S.C. § 158(c) A-3

29 U.S.C. § 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a) provides:

> **(a) Unfair labor practices by employer**
>
> It shall be an unfair labor practice for an employer—
>
> **(1)** to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *

29 U.S.C. § 158(c) provides:

> **(c) Expression of views without threat of reprisal or force or promise of benefit**
>
> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

9th Circuit Case Number(s) 15-72894 (L), 15-73101

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Signature (use "s/" format) s/ Luke M. Rona

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